

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 9128/13
Lubomír PODLIPNÝ and Marek PODLIPNÝ
against the Czech Republic

The European Court of Human Rights (Fifth Section), sitting on 31 March 2022 as a Committee composed of:

Mārtiņš Mits, *President,*
Ivana Jelić,
Kateřina Šimáčková, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 9128/13) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 30 January 2013 by two Czech nationals, Mr Lubomír Podlipný and Mr Marek Podlipný, who were born in 1974 and 1975 respectively and live in Dobřichovice and Prague ("the applicants"), and who were represented by Mr V. Kotek, a lawyer practising in Brno;

the decision to give notice of the complaint concerning the alleged unfairness of criminal proceedings to the Czech Government ("the Government"), represented by their Agent, Mr V. A. Schorm, from the Ministry of Justice, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The application concerns the alleged unfairness of criminal proceedings against the applicants on account of their inability to examine witnesses K. and O. before the trial court (Article 6 §§ 1 and 3 (d) of the Convention).

2. Before the applicants were charged with tax evasion on 14 October 2004, the police questioned K., a Ukrainian national subject to an expulsion order from the Czech Republic, in the presence of a judge.

3. The Czech prosecution authorities subsequently asked their Ukrainian counterparts for mutual assistance in order to question O., a former business partner of the first applicant, who was allegedly not willing to travel to the Czech Republic. Their request for the applicants' defence lawyers to be permitted to be present at the interview was denied as being contrary to Ukrainian law, and O. was interviewed without the applicants' lawyers being present.

4. During several hearings held before the Prague Regional Court, the court heard the applicants and their co-accused, the authors of the expert opinions, and numerous witnesses; the statements of K. and O. were read out.

5. By a judgment of 29 May 2008, the Regional Court found the applicants guilty and sentenced them to six years' imprisonment, relying on a large amount of evidence, in particular statements of the applicants' co-accused, witness testimonies, multiple pieces of documentary evidence, and expert opinions. As to the statements of the two absent witnesses, the court considered that O. had rebutted the accused's defence as he had testified that the signature on the relevant documents had not been his and that he had left the company in 2000, which was corroborated by an Interpol report on the company and a copy of O.'s passport. The court further stated that K.'s statement should not be overemphasised and was not fully credible; referring to forensic handwriting analysis, it considered that the defendants had misused K.'s signature to their advantage.

6. The Prague High Court dismissed an appeal by the applicants and upheld the judgment in their respect. It stated, *inter alia*, that the Regional Court had explained why it had not been necessary to further question K. and O.

7. Appeals on points of law by the applicants and a constitutional appeal by them were both likewise dismissed. In a decision of 13 August 2012 the Constitutional Court held that the statements of K. and O. constituted lawful evidence: K.'s interview could not be repeated since he could not be reached after his departure from the Czech Republic, and concerning O.'s interview in Ukraine, Ukrainian law did not allow the presence of a defence lawyer at a witness examination. Moreover, those statements were only one of many pieces of evidence and in no event did they amount to decisive evidence against the applicants.

8. Relying on Article 6 §§ 1 and 3 (d) of the Convention, the applicants complained of the unfairness of the criminal proceedings against them, in particular the fact that their conviction was based on the evidence of absent witnesses which neither they nor their lawyers had had the opportunity to examine.

THE COURT'S ASSESSMENT

9. The principles to be applied in cases where a prosecution witness did not attend the trial and statements previously made by him or her were admitted as evidence have been summarised and refined in *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, ECHR 2011), and confirmed in *Schatschaschwili v. Germany* ([GC] no. 9154/10, ECHR 2015). According to the principles which have been developed, it is necessary to examine:

(i) whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statement as evidence;

(ii) whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction; and

(iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps faced by the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair.

A. Whether there was a good reason for admitting the evidence of absent witnesses

10. The Court observes, and it was undisputed by the parties, that witnesses O. and K. were heard at the pre-trial stage. The interview of K., who was subject to an expulsion order from the Czech Republic, was carried out before the applicants were charged. O. was questioned by the Ukrainian authorities acting upon a letter rogatory from the Czech prosecution authorities. The latter's request for defence lawyers to be permitted to attend the examination was refused for being in contravention of Ukrainian law.

11. The provisions of Article 6 §§ 1 and 3 (d) require the domestic authorities to take positive steps to enable the accused to examine or have examined witnesses against him, which means that they should actively search for the witnesses (see *Lučić v. Croatia*, no. 5699/11, § 79, 27 February 2014, and *Colac v. Romania*, no. 26504/06, § 47, 10 February 2015).

12. In the present case, it appears that the trial court satisfied itself with reading out the pre-trial statements made by K. and O. No specific reason for the absence of K. and O. was in fact ever given, as was pointed out by the applicants. The reasons advanced by the Government, relating to the risk that it would not be possible to ascertain K.'s whereabouts after his expulsion from the Czech Republic, and to O.'s unwillingness to testify in the Czech Republic, are not stated in the Regional Court's judgment. There is no indication therein that the Regional Court took any steps to ensure that those witnesses would appear. In particular, neither that judgment nor the

Constitutional Court's decision indicate that the trial court enquired whether the police had ever attempted to find out their new addresses or to get details about their absence, including whether it was permanent or temporary (compare *Gabrielyan v. Armenia*, no. 8088/05, § 82, 10 April 2012).

13. Accordingly, the Court concludes that it has not been shown that there were good reasons for the non-appearance of the witnesses K. and O.

B. Whether the evidence of the absent witnesses was the sole or decisive basis for the applicants' conviction

14. It is not disputed between the parties that neither testimony was the sole evidence. The Regional Court's judgment shows that O.'s testimony only rebutted the applicants' versions of the facts, but it was not directly relied upon by the trial court when convicting the applicants. In addition, it was corroborated by a copy of O.'s passport and by the account in the Interpol report. The Regional Court stated that K.'s testimony was not to be overemphasised, and the trial court saw that testimony as not fully trustworthy; in addition, the fact that K. did not sign the relevant documents was also proved by an expert report. Those conclusions were subsequently upheld by the appellate court which saw no reason not to concur with the trial court in this respect.

15. The Court, therefore, considers that the evidence of the absent witnesses was neither decisive for the applicants' conviction nor carried such significant weight that it may have handicapped their defence. Their conviction was based on a large amount of other evidence, K.'s and O.'s statements being only two pieces of a mosaic which, once put together, gave the trial court a comprehensive vision of the facts, that is to say, of the applicants' scheme to evade taxes. Unlike the applicants, the Court is therefore of the view that the testimony of K. and O. played a mere supplementary role and that the applicants were convicted on the basis of a large amount of evidence (see paragraph 5 above).

C. Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

16. According to *Schatschaschwili* (cited above, §§ 125-31), counterbalancing factors to be taken into account in this context can include (i) the trial court's approach to the untested evidence, (ii) the availability and strength of further incriminating evidence, and (iii) the opportunity for the applicants to give their own version of the events, to cast doubt on the credibility of the absent witnesses and to point out any incoherence or inconsistency in their statements.

17. However, given the Court's finding above that the statements of K. and O. were neither "decisive" nor "carried significant weight" in the

applicants' conviction, it is not necessary to review the existence of counterbalancing factors in this instance (see *Schatschaschwili*, cited above, § 116, and *Sitnevskiy and Chaykovskiy v. Ukraine*, nos. 48016/06 and 7817/07, § 125, 10 November 2016). Given the limited impact of those untested statements, their admission was not able to undermine the overall fairness of the proceedings.

18. In any event, the Court observes that the applicants' conviction was supported by a wide array of other incriminating evidence. The applicants, represented by their defence lawyers, had an unlimited opportunity to come up with their version of the events, of which they availed themselves, and to cast doubt on the credibility of the witnesses and on the admissibility of the evidence of the absent witnesses, which provided an adequate counterbalancing factor in that regard.

D. Conclusion

19. In view of the above, the Court concludes in the circumstances of the present case that the proceedings as a whole were fair. The applicants' complaint must therefore be dismissed as manifestly ill-founded in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 28 April 2022.

Martina Keller Deputy Registrar	Mārtiņš Mits President